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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Hector Jesus Espinoza-Beltran,) No. CIV 11-088-TUC-FRZ (GEE)
10 Petitioner,)
11 vs.) **REPORT AND**
12 Charles Ryan; et al.,) **RECOMMENDATION**
13 Respondents.)
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15 Pending before the court is an amended petition for writ of habeas corpus filed on April
16 4, 2011, by Hector Jesus Espinoza-Beltran, an inmate confined in the Arizona State Prison
17 Complex in Tucson, Arizona. (Doc. 6)

18 Pursuant to the Rules of Practice of this court, this matter was referred to Magistrate
19 Judge Edmonds for report and recommendation.

20 The Magistrate Judge recommends the District Court, after its independent review of the
21 record, enter an order dismissing the petition. It is time-barred.
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23 Summary of the Case

24 Espinoza-Beltran was convicted after a jury trial of “one count of first degree murder,
25 six counts of attempted first degree murder, and one count of participating in a criminal street
26 gang.” (Respondents’ answer, Exhibit A, pp. 1-2.) The trial court sentenced Espinoza-Beltran
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1 to “life with the possibility of parole after 25 years” for murder and to concurrent sentences of
2 18 years’ imprisonment for the remaining offenses. (Respondents’ answer, Exhibit B.)

3 On direct appeal, Espinoza-Beltran argued the evidence presented at trial was insufficient
4 for conviction and the reasonable doubt instruction was error. (Respondents’ answer, Exhibits
5 A, F.) The court of appeals affirmed his convictions and sentences on January 23, 2001.
6 (Respondents’ answer, Exhibit A.) Espinoza-Beltran appealed again, but the Arizona Supreme
7 Court denied review on June 20, 2001. (Respondents’ answer, Exhibit C.) He did not petition
8 the U.S. Supreme Court for review. (Respondents’ answer, p. 4.)

9 Approximately six years later, on November 19, 2007, Espinoza-Beltran filed notice of
10 post-conviction relief alleging he recently discovered the existence of “a familial relationship
11 between the actual perpetrator and the primary prosecution witness.” (Respondents’ answer,
12 Exhibit F.) The trial court dismissed the notice on December 26, 2007. *Id.* Espinoza-Beltran
13 filed a motion for reconsideration on January 11, 2008, but it was denied by the trial court.
14 (Respondents’ answer, Exhibits H, I.)

15 On June 28, 2010, Espinoza-Beltran filed a second motion for reconsideration arguing
16 (1) his appellate attorney failed to argue the trial court should have granted a mistrial for the
17 government’s failure to disclose the felony record of its witness, (2) the trial judge committed
18 a *Batson* error, (3) the prosecutor committed misconduct, and (4) trial counsel and appellate
19 counsel were ineffective. (Respondents’ answer, Exhibit J.) The trial court denied the motion
20 on July 9, 2010. (Respondents’ answer, Exhibit K.)

21 On July 26, 2010, Espinoza-Beltran filed an additional motion for reconsideration, which
22 was denied on July 28, 2010. (Respondents’ answer, Exhibit L, M.) On August 18, 2010,
23 Espinoza-Beltran filed a petition for special action with the court of appeals, which was denied
24 on August 23, 2010. (Respondents’ answer, Exhibit N, O.)

25 On January 28, 2011, Espinoza-Beltran filed in this court a petition for writ of habeas
26 corpus pursuant to 28 U.S.C. § 2254. He filed an amended petition at the court’s direction on
27 April 4, 2011. Espinoza-Beltran raises four grounds for relief: (1) appellate counsel failed to
28 argue the trial court should have granted a mistrial when the prosecution failed to disclose

1 before trial that its witness was a convicted felon; (2) the trial judge erred in ruling on a
2 challenge pursuant to *Batson*; (3) the prosecutor engaged in misconduct by failing to disclose
3 before trial that its witness was a convicted felon; (4)(a) trial counsel rendered ineffective
4 assistance by failing to call witnesses or to cross examine witnesses, and (4)(b) appellate
5 counsel rendered ineffective assistance by failing to raise claims on appeal. (Doc. 6);
6 (Respondents' answer, Exhibit J (Exhibit B).)

7 On June 28, 2011, the respondents filed an answer arguing, among other things, that the
8 petition is time-barred. Espinoza-Beltran filed a reply on July 7, 2011, arguing the limitation
9 period should be equitably tolled due to his education and language deficits.

10 11 Discussion

12 The writ of habeas corpus affords relief to persons in custody in violation of the
13 Constitution or laws or treaties of the United States. 28 U.S.C. § 2241. A one-year limitation
14 period applies to persons in custody pursuant to a state court judgment. 28 U.S.C. § 2244(d).
15 The statute reads in pertinent part as follows:

- 16 (1) A 1-year period of limitation shall apply to an application for a writ of
17 habeas corpus by a person in custody pursuant to the judgment of a State
18 court. The limitation period shall run from the latest of--
19 (A) the date on which the judgment became final by the conclusion of
20 direct review or the expiration of the time for seeking such review;
21 (B) the date on which the impediment to filing an application created
22 by State action in violation of the Constitution or laws of the
23 United States is removed, if the applicant was prevented from filing
24 by such State action;
25 (C) the date on which the constitutional right asserted was initially
26 recognized by the Supreme Court, if the right has been newly
27 recognized by the Supreme Court and made retroactively
28 applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims
presented could have been discovered through the exercise of due
diligence.
- (2) The time during which a properly filed application for State
post-conviction or other collateral review with respect to the pertinent

1 judgment or claim is pending shall not be counted toward any period of
2 limitation under this subsection.

3 28 U.S.C. § 2244(d).

4 The limitation period for all of Espinoza-Beltran's claims was triggered on "the date on
5 which the judgment became final by the conclusion of direct review or the expiration of the time
6 for seeking such review."¹ 28 U.S.C. § 2244(d)(1)(A). Espinoza-Beltran's direct appeal was
7 denied on January 23, 2001. (Respondents' answer, Exhibit A.) He appealed again, but the
8 Arizona Supreme Court denied review on June 20, 2001. (Respondents' answer, Exhibit C.)
9 Espinoza-Beltran then had 90 days to petition the U.S. Supreme Court for review. Sup. Ct. R.
10 13. When he did not do so, his judgment became final on September 18, 2001. *See Bowen v.*
11 *Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

12 The one-year period began running the next day and expired one year later on September
13 18, 2002. Espinoza-Beltran filed his petition in this court on January 28, 2011. It is time-
14 barred.

15 In his reply, Espinoza-Beltran argues the limitation period should be equitably tolled
16 because his native language is Spanish, he has only a sixth-grade proficiency in English, and
17 he has no lawyer or legal assistance. (Doc. 12)

18 "[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been
19 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and
20 prevented timely filing." *Lakey v. Hickman*, 633 F.3d 782, 786 (9th Cir. 2011) (punctuation

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22 ¹ Espinoza-Beltran explains in his reply that his claims are based on "newly discovered
23 evidence . . . that the petitioner noticed through a review of the case trial transcripts, case motion
24 filings, and police reports." (Doc. 12, p. 4) Under certain circumstances, claims that rely on newly
25 discovered facts can qualify for the triggering subsection 2244(d)(1)(D). That subsection does not
26 apply here, however, because the *facts* upon which Espinoza-Beltran's claims rely are not new. They
27 were already apparent at the time of the trial or by the time counsel filed his direct appeal. The *legal*
28 *import* of those facts was only recently discovered to Espinoza-Beltran. This, however, is not the test.
See Hasan v. Galaza, 254 F.3d 1150, 1154 n. 3 (9th Cir. 2001) ("Time begins when the prisoner knows
(or through diligence could discover) the important facts, not when the prisoner recognizes their legal
significance.").

1 modified) “The petitioner must additionally show that the extraordinary circumstances were
2 the cause of his untimeliness and that the extraordinary circumstances made it impossible to file
3 a petition on time.” *Id.* “The high threshold of extraordinary circumstances is necessary lest
4 the exceptions swallow the rule.” *Id.*

5 In this case, Espinoza-Beltran argues generally that his limited understanding of the law
6 and his poor English language skills entitle him to equitable tolling. He does not, however,
7 specifically explain how his particular circumstances caused him to file an untimely petition.
8 He does not, for example, allege that he had no access to the limitation statute or that he was
9 unable to read and understand it. The court notes that his state court filings from this period
10 indicate that he had the ability to recognize legal issues and discuss them in a coherent manner.
11 *See* (Respondents’ answer, Exhibits D, G, H.) It is therefore unlikely that his pro se status or
12 language difficulties caused his untimeliness. The court concludes equitable tolling is not
13 available in this case. *See, e.g., Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“[A]
14 pro se petitioner’s lack of legal sophistication is not, by itself, an extraordinary circumstance
15 warranting equitable tolling.”); *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999)
16 (Unfamiliarity with the legal process, even if due to illiteracy, does not merit equitable tolling.);
17 *Humphrey v. Clark*, 2010 WL 148199, * 4 (C.D.Cal. 2010) (“Petitioner’s illiteracy does not
18 provide a basis for equitably tolling the limitations period.”); *U.S. v. Van Poyck*, 980 F.Supp.
19 1108, 1111 (C.D.Cal. 1997) (Equitable tolling was not warranted where the petitioner alleged
20 “all of his state transcripts were destroyed, that . . . he does not speak or understand English well
21 nor does he understand the law, and that his prison has been in “lockdown” status that has
22 prevented him from using the prison law library.”)

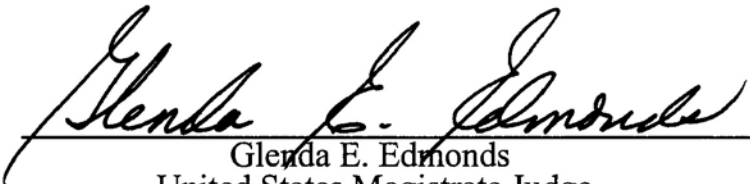
23 24 RECOMMENDATION

25 The Magistrate Judge recommends that the District Court, after its independent review
26 of the record, enter an order DISMISSING the Petition for Writ of Habeas Corpus. (Doc. 6)
27 It is time-barred.
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1 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within
2 14 days of being served with a copy of this report and recommendation. If objections are not
3 timely filed, they may be deemed waived.

4 The Clerk is directed to send a copy of this report and recommendation to the petitioner
5 and the respondents.

6 DATED this 18th day of October, 2011.

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10 Glenda E. Edmonds
11 United States Magistrate Judge
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